YONG NYUK FANG & ANOR A

v.

TOH BOON PIN & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
AZAHAR MOHAMED J
[NO: 26-2-2001]
3 AUGUST 2006

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Charges - Whether lacked material particulars - Whether bad and defective - Whether curable* C

CONTRACT: *Assignment - Deed of assignment - Whether absolute assignment – Whether entire rights, interest and title of third respondent conveyed to Mayban - Civil Law Act 1956, s. 4(3) - Whether committal proceedings misconceived* D

CIVIL PROCEDURE: *Injunction - Ex parte injunctions - Whether lapsed after expiry of 21 days - Whether injunctions have relevance to committal proceedings - Whether proceedings of contempt of court founded on alleged violation of order not clear and specific - Whether committal proceedings misconceived* E

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Injunctions - Ex parte injunctions - Whether injunctions have relevance to committal proceedings - Whether proceedings of contempt of court founded on alleged violation of order not clear and specific - Whether Second Order preserved any part of First Order - Whether First Order lapsed - Whether committal proceedings misconceived* F

G

This was an application (encl. 95) instituted by the applicants to commit to prison the first respondent and his lawyer, Ng Chew Hor (Ng) for alleged contempt of court on the ground that they had willfully and deliberately breached the order of this court dated 2 May 2001 (encl. 12) and 16 May 2001 (encl. 67). The H facts were that the first respondent had entered into two guarantees with Mayban Finance Bhd (Mayban) in respect of Mayban's loans to T & T Treasures Time Sdn Bhd (the third respondent) to purchase Parcel G9 in Summit Parade (first parcel) and Parcel G10 (second parcel). Under the two guarantees, the I applicants, the first and second respondents as directors of the third respondent entered into two guarantees with Mayban in

respect of the third respondent's indebtedness to Mayban. Thereafter, the third respondent entered with Mayban into First Loan Agreement cum Deed of Assignment (the first agreement) and Second Loan Agreement cum Deed of Assignment (the second agreement) in respect of the first and second parcels as the third respondent had purchased first and second parcels with loans from Mayban. Then, the third respondent entered into Third Loan Agreement cum Deed of Assignment (the third agreement) with Mayban in respect of Parcel 18-12A (the third parcel) with a loan from Mayban. The first and second respondents entered into a guarantee with Mayban (the third guarantee) in respect of Mayban's loan to the third respondent to purchase the third parcel. On 2 May 2001, the applicants obtained an *ex parte* order (the first order) (i) directing the first and second respondents to hand over certain documents to one Koh Kheng Min (Koh) who was appointed to audit the third respondent's accounts, (ii) restraining the first and second respondents from interfering with Koh's stock taking exercise of the third respondent's stocks and (iii) directing the first and second respondents to hand over the third respondent's business to Koh until final disposal of the petition or further order (three *ex parte* injunctions). Subsequently on 16 May 2001, the applicants obtained a consent order (the second order).

On 20 May 2003, the first respondent had paid a certain amount of money to Mayban to discharge the third respondent's loans. On 28 October 2003, in the originating summons (OS) the High Court had ordered that the first respondent was entitled to Mayban's securities in first, second and third parcels and Mayban was to assign first, second and third parcels to the first respondent (First OS Order). On 8 October 2003, the official receiver had sent a letter to the first and second respondents, giving a notice that any dealing with the third respondent's assets without the official receiver's consent was prohibited. On 22 October 2003, in a letter of reply to the official receiver, it was stated that the first respondent's payment as the third respondent's guarantor entitled the first respondent to Mayban's securities under ss. 93 and 94 of the Contract Act 1950. On 27 February 2004, the applicants applied for and obtained leave of High Court to intervene in the OS. On 28 February 2004, the first respondent assigned the first, second and third parcels to Century Privilege Sdn Bhd by way of public tender. On 9 March 2004, in the OS, upon application by the applicants, the High

Court set aside First OS Order. On 10 June 2004, the applicants filed *ex parte* notice of motion (encl. 91) applying for leave to commence committal proceedings against the first respondent and Ng. According to the statements filed in this committal proceedings: (a) the first respondent and Ng had willfully and deliberately breached the order of this honourable court dated 2 May 2001 and 16 May 2001 (first charge); (b) the first respondent,aided and abetted by Ng, had tried, illegally, to sell the three properties owned by the third respondent (second charge); (c) the first respondent had willfully and deliberately interfered with the three properties owned by the third respondent and in the possession, control and custody of the official receiver (third charge); (d) the first respondent, aided and abetted by Ng, had filed an originating summons at the High Court 2 to get orders which involved all those three properties which was sub judice at High Court 1 under the Court Order 16 May 2001 (fourth charge); (e) the first respondent, aided and abetted by Ng, had interfered with and tried to sell all the three properties of the third respondent without the knowledge and permission of the official receiver (fifth charge) and (f) the first respondent had breached the court orders 2 May 2001 and 16 May 2001 given under O. 29 r. 2(1) and O. 3 of the Rules of the High Court 1980 for the preservation of the three properties (sixth charge) and (g) the petition is still pending (seventh charge).

Held:

(1) In committal proceedings, the statements filed constitute the charge (O. 52 r. 2(1), (2) and 5(3) of the Rules of the High Court 1980). The person asked to be committed should truly understand the nature of the charge he is facing in view of the fact that the personal liberty of the person is involved. In this regard, the charges herein lacked material particulars *ie*, they did not specify how the first respondent and Ng had 'wilfully and deliberately' breached the first and second orders, or how the first respondent had interfered with the first, second and third parcels in possession, custody and control of the official receiver. Further, there was no particularization how Ng had 'aided and abetted' the first respondent in filing the OS which was 'sub judice' of the court hearing the petition. They also did not specify the particulars for the first respondent and Ng to know the alleged contumelious act so

as to enable both of them to defend properly to meet the allegations. These charges were bad and defective for lacking in particulars. It was not an irregularity that was curable. (para 21)

(2) The first, second and third agreements (the three agreements) in respect of the three respective parcels were absolute assignment and not purporting to be a charge only in favour of Mayban, that was to say, the entire rights, interest and title of the third respondent had been conveyed to Mayban. Any absolute assignment shall be to pass and transfer the legal rights and all legal and other remedies for the same and the power to give a good discharge for the same without concurrence of the assignor (s. 4(3) Civil Law Act 1956). All the three parcels having been absolutely assigned to Mayban were not at all material time the property of the third respondent as their ownership having been vested in Mayban by virtue of the three assignments. It therefore followed that the third respondent did not own any right in the three parcels at the material time contrary to what was stated in the charges. For this reason, the first respondent and Ng could not be guilty of the second, third and fifth charges. (paras 23 & 24)

(3) Under O. 29 r. 1 (2B) of the Rules of the High Court 1980, all the three *ex parte* injunctions would have lapsed after the expiry of 21 days from the date of the first order, 2 May 2001. Hence, the first, second and third injunctions have no relevance to the committal proceedings. Further, a close reading of the first order showed that it did not provide for Koh to receive and manage the first, second and third parcels. In any event, if the first order was ambiguous as to whether it provided for all the three parcels, the first respondent and Ng were entitled to the benefit of such an ambiguity in the interpretation of the first order. No proceedings for contempt could be founded on the alleged violation of an order, which was not clear and specific. (para 26)

(4) The second order, which was recorded on 16 May 2001, did not preserve any part of the first order. The *ex parte* first order had therefore lapsed. As a consequence, there could not be any contempt committed by the first respondent as alleged in the first, second and sixth charges in respect of the first order

concerning all the three parcels. Ng could not also have been guilty. The second order also did not provide for the official receiver to receive and manage all the three parcels for the reason that the order did not expressly state that the official receiver should receive and manage the parcels in question. Accordingly there could not be any contempt committed by the first respondent and Ng on the first, second and third charges in respect of the second order concerning the first, second and third parcels. The committal proceedings were misconceived. (paras 26, 27 & 28)

Case(s) referred to:

Cheah Cheng Lan v. Heng Yea Lee [2001] 1 CLJ 727 CA ***(refd)***
Dulal Chandra Bhar v. Sukumar Banerjee AIR [1958] Calcutta 474 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***
Re Bramblevale Ltd [1970] Ch 128 ***(refd)***
SN Bannerjee v. Kuchwar Lime & Stone Co Ltd AIR [1938] PC 295 ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 ***(refd)***
Zainuddin v. Atsco Ltd [2001] 4 CLJ 141 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 3, O. 29 rr. 1(2B), 2(1), O. 52 r. 2(1), (2), 5(3)

For the applicants - Thevin (Loh Song Chuan & Shanmugan with him); M/s Loh & Renga
For the 1st respondent - Julie Lim; M/s Julie Lim, Vasanthan & Co
For the Ng Chew Hor - KK Wong; M/s Lee Hishammuddin Allen & Gledhill

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed J:

[1] This was an application in encl. 95 dated 5 July 2004 instituted by Yong Nyuk Fang and Pean Kar Fui (the applicants) to commit to prison Toh Boon Pin (the 1st respondent) and his lawyer, Ng Chew Hor (Ng) for alleged contempt of court on the ground that they had wilfully and deliberately breached the order of this court dated 2 May 2001 (encl. 12) and 16 May 2001 (encl. 67).

[2] It is important to set out the factual background and the sequence of events leading to the application. On 11 September 1997, the 1st respondent entered into two guarantees with Mayban Finance Bhd (Mayban) in respect of Mayban's loans to T & T Treasures Time Sdn. Bhd. (the 3rd respondent) to purchase Parcel no. G 9 in Summit Parade built on land held under Grant No. 24639 PT No. 3273 Bandar Penggaram, Batu Pahat District, Johore (the first parcel) and Parcel no. G10 in Summit Parade built on land held under Grant No. 24639 PT No. 3273 Bandar Penggaram, Batu Pahat District, Johore (the second parcel). I pause here to note that under the two guarantees, the applicants, the 1st and 2nd respondents as directors of the 3rd respondent entered into 2 guarantees with Mayban in respect of the 3rd respondent's indebtedness to Mayban.

[3] Later, on 14 October 1997, the 3rd respondent entered with Mayban into first loan agreement cum deed of assignment (the first agreement) and second loan agreement cum deed of assignment (the second agreement) in respect of the first and second parcels as the 3rd respondent had purchased first and second parcels with loans from Mayban.

[4] Next, on 26 August 1999, two things happened. Firstly, the 3rd respondent entered into third loan agreement cum deed of assignment (the third agreement) with Mayban in respect of Parcel no. 18-12A, Storey No. 18, Aster Court Apartment built on land under Master Title No. HS (D) 164839 No. PT PTB 18921 Johore Bahru (the third parcel) as the 3rd respondent purchased the third parcel with a loan from Mayban. Secondly, the 1st respondent and another director (2nd respondent) as directors of the 3rd respondent entered into a guarantee with Mayban (the third guarantee) in respect of Mayban's loan to the 3rd respondent to purchase the third parcel.

[5] On 2 May 2001, the applicants obtained an *ex parte* order from Azhar bin Haji Maah J (the first order).

[6] Subsequently, on 16 May 2001, the applicants obtained a consent order recorded by the same learned judge (the second order). The 3rd respondent defaulted in repayment of loans due from the 3rd respondent to Mayban (the 3rd respondent's loan) and consequently, Mayban had demanded repayment of the 3rd respondent's loans from, among others, the 1st respondent, pursuant to the first, second and third guarantees.

[7] On 20 May 2003, the 1st respondent paid RM519,038.63 to Mayban to discharge the 3rd respondent's loans.

[8] Afterward, on 4 July 2003 the 1st respondent filed Originating Summons No. 24-1584-2003 against Mayban in Johore Bahru High Court (the OS) and applied for, among others, orders that – (1) the 1st respondent was entitled to Mayban's securities in first, second and third parcels; and (2) Mayban to assign first, second and third parcels to the 1st respondent. On 28 October 2003, in the OS, High Court ordered that – (1) the 1st respondent was entitled to Mayban's securities in first, second and third parcels; and (2) Mayban to assign first, second and third parcels to 1st respondent ("first OS order").

[9] On 29 September 2003, the then solicitors for the applicants, Messrs Mogan Karuppiah, sent a letter to official receiver stating that:

1. The applicants had met official receiver's officer;
2. Official receiver did not know of the disposal of first, second and third parcels;
3. First, second and third parcels could not be disposed without official receiver's consent under the second order; and
4. Any disposal of first, second and third parcels without official receiver's consent would breach the second order

[10] On 8 October 2003 the official receiver sent a letter to solicitors for the 1st and 2nd respondents, Messrs Yeo Ng Fan & Associates (wherein Ng was a partner) giving a notice that any dealing with the 3rd respondent's assets without the official receiver's consent was prohibited.

[11] On 22 October 2003, Messrs Ng, Fan & Associates replied to the official receiver's letter stating that the 1st respondent payment as the 3rd respondent's guarantor entitled the 1st respondent to Mayban's securities under ss. 93 and 94 of the Contract Act 1950.

[12] Mayban assigned first, second and third parcels to the 1st respondent on 17 December 2003.

[13] On 27 February 2004, the applicants applied for and obtained leave of High Court to intervene in the OS.

[14] On 28 February 2004, the 1st respondent assigned the first, second and third parcels to Century Privilege Sdn. Bhd. by way of public tender.

[15] On 9 March 2004, in the OS, upon application by the applicants, the High Court set aside first OS order.

[16] On 10 June 2004, the applicants filed *ex parte* notice of motion (encl. No. 91) applying for leave to commence Committal Proceedings against the 1st respondent and Ng.

[17] According to the statements filed in this Committal Proceedings:

a) The 1st respondent and Ng had wilfully and deliberately breached the order of this Honorable Court dated 2 May 2001 (encl. 12) and 16 May 2001 (encl. 67) (first charge);

b) The 1st respondent has been aided and abetted by Ng had tried, illegally, to sell 3 properties known as:

i) One unit of commercial shop known as G9, Tingkat Bawah, The Summit Batu Pahat, Johor, which has the measurement of 51 square meter (549 square feet) which is held under the Master Title Grant No. 26439, Lot PT No. 3273, Bandar Penggaram, Daerah Batu Pahat, Johor;

ii) One unit of commercial shop known as G10, Tingkat Bawah, The Summit Batu Pahat, Johor, which has the measurement of 51 square meter (549 square feet) which is held under the Master Title Grant No. 26439, Lot PT No. 3273, Bandar Penggaram, Daerah Batu Pahat, Johor; and

iii) One unit of condominium known as No. 18.12A-Aster Court, Plaza DNP, Johor Bahru, Johor, held under Master Title HS (D) 164839, PTB 18921, Bandar Johor Bahru, Daerah Johor Bahru, Johor;

owned by the 3rd respondent, bound by under court orders dated 2 May 2001 and 16 May 2001 which was given by High Court (1) of Johor Bahru (second charge);

c) The 1st respondent has wilfully and deliberately interfered with the three (3) landed properties owned by the 3rd respondent and in the possession, control and custody of the official receiver, Malaysia as Receiver and Manager of the third respondent (third charge);

d) The 1st respondent who is aided and abetted by his Ng had filed an Originating Summons No. MT2-24-1584 of 2003 at the High Court 2 to get orders which involved all those 3 properties which is sub judice at High Court 1 under the court order dated 16 May 2001 (fourth charge);

e) The 1st respondent who is aided and abetted by Ng had interfered with and tried to sell all those 3 properties of the 3rd respondent without the knowledge and permission of the official receiver Malaysia, who is the Receiver and Manager of the 3rd respondent, or the petitioner hereby (fifth charge);

f) The 1st respondent has breached the court orders dated 2 May 2001 and 16 May 2001 given by this Honorable Court under O. 29 r. 2(1) and O. 3 of the Rules of the High Court 1980 for the preservation of those 3 properties (sixth charge); and

g) The petition is still pending (seventh charge).

[18] It is settled law that in order to sustain a conviction in contempt proceedings, the standard of proof required is one beyond a reasonable doubt and it is incumbent upon the applicant to prove beyond a reasonable doubt that the person asked to be committed had wilfully or deliberately disobeyed or disregarded the order of the court. The authority to support this proposition is to be found in the judgment of Lee Hun Hoe CJ (Borneo) in *T.O. Thomas v. Asia Fishing Industry Pte. Ltd.* [1977] 1 MLJ 151. There, His Lordship had this to say at p. 155 of the report:

> Wilfully, disobeying an order of the court constituted contempt. This commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required to do by the process, order or decree of the court: *Miller v. Knox*. The contempt must be wilful. An order to court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional. *Fairclough & Sons v. Manchester Ship Canal Co. (No. 2)*.

[19] In *Re Bramblevale Ltd* [1970] Ch 128 Lord Denning MR said, at p. 137:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

[20] To appreciate the significance of the meaning of the expression beyond reasonable doubt, I refer to the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372 where Denning J (as he then was) had this to say:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[21] Before turning to give my views regarding some of the points raised by learned counsels for all the parties concerned, I should perhaps at this stage say that in Committal Proceedings the statements filed constitute the charge (see: O. 52 r. 2(1), (2) and 5(3) of the Rules of the High Court 1980 (the RHC) and *Zainuddin v. Atsco Ltd* [2001] 4 CLJ 141). In law a charge is a precise formulation of the specific accusation made against a person who is entitled to know its nature at the very earliest stage. Hence, the charge acts as a notice to the person asked to be committed to prison of the matter with which he is accused of and the charge must convey with sufficient clearness and certainty that which the applicant intends to prove beyond a reasonable doubt against him (see: *Mallal's Criminal Procedure*, 6th edn). I need hardly to say that the person asked to be committed should truly understand the nature of the charge he is facing in view of the fact that the personal liberty of the person is involved. In this regard I noted that the charges lacked material particulars. There were several problems with the charges. In the first place, the first and sixth charges did not specify how the 1st respondent and Ng "wilfully and deliberately" breached the first and second orders. Next, the third charge did not state how the 1st respondent "wilfully and deliberately" interfered with the first, second and third parcels in the possession, custody and control of the official

receiver. Further on this point, the fourth charge did not particularize how Ng "aided and abetted" the 1st respondent in filing the OS which was "sub judice" of the court hearing the petition. Further, the fourth charge did not particularize how the 1st respondent had committed the "sub judice" specie of contempt. Finally, the seventh charge did not specify the particulars for the 1st respondent and Ng to know the alleged contumelious act so as to enable both of them to defend properly to meet the allegations. Those charges can be said to be bad and defective for lacking in particulars. I do not think it is an irregularity, which is curable. This is a very serious matter. A person may be sent to prison for it. Before the court makes an order to commit a person to prison the procedural rules must be strictly enforced and complied with.

[22] One of the crucial issues on which the Committal Proceedings turns and which requires determination revolves around the question whether the 3rd respondent had absolutely assigned the first, second and third parcels to Mayban. In my view the answer to this question lies in the judgment of the Federal Court in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 where it was held that whether an assignment is an absolute assignment or an assignment by way of security was to be gathered from the four corners of the instrument itself.

[23] Now, cl. 4 of the first and second agreements and section 3.01 of the third agreement provide that the 3rd respondent "hereby absolutely assigns" to Mayban the first, second and third parcels and the "full and entire benefit" of the sale agreements of the three parcels together with all the rights and interests of the 3rd respondent. After much thought and consideration to all aspect of this issue I had made a decision that reading the documents as a whole in particular the clauses that I have mentioned a moment ago, all the three agreements in respect of the three respective parcels were absolute assignment and not purporting to be a charge only in favour of Mayban, that is to say, the entire rights, interest and title of the 3rd respondent had been conveyed to Mayban.

[24] What is the effect? Firstly, I refer to s. 4(3) of the Civil Law Act 1956, which provides, *inter alia*, that any absolute assignment shall be to pass and transfer the legal rights and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor. Secondly, in the case of *Nouvau Mont Dor*, speaking for the Federal Court, Seah FJ said "the assignment was in the terms absolute in the sense that the assignor intended to pass and transfer to the assignee absolutely the beneficial interest as well as all the rights in the sales and purchase agreement". Based on the above principles, all the 3 parcels having been absolutely assigned to Mayban were not at all material time the property of the 3rd respondent as their ownership having been vested in Mayban by virtue of the 3 assignments. It therefore follows that the 3rd respondent did not own any right in the 3 parcels at the material time contrary to what was stated in the charges. For this reason, the 1st respondent and Ng could not be guilty of the second, third and fifth charges.

[25] As I have stated earlier, the first order dated 2 May 2001 was obtained on an *ex parte* basis. That order, *inter alia*:

a) Directed 1st and 2nd respondents to hand over certain documents to one Mr. Koh Kheng Min (Koh), who was appointed to audit the 3rd respondent's accounts (first injunction);

b) Restrained 1st and 2nd respondents from interfering with Koh's stock taking exercise of the 3rd respondent's stocks (second injunction); and

c) Directed the 1st and 2nd respondents to hand over the 3rd respondent's business to Koh until final disposal of the petition or further order (third injunction).

[26] Under O. 29 r. 1(2B) of the RHC all the 3 *ex parte* injunctions would have lapsed after the expiry of 21 days from the date of the first order, 2 May 2001. In *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 CLJ 727 the Court of Appeal held that by virtue of that order, the life of an *ex parte* injunction cannot go beyond the period of 21 days. That is why the first, second and third injunctions have no relevance to the Committal Proceedings. Further, a close reading of the first order shows that it did not provide for Koh to receive and manage the first, second and third parcels. The first order was very detailed (more than 6 pages) and

that if the court had indeed intended to cater for the 3 Parcels, that order would have expressly provided for such a matter. In any event, if the first order was ambiguous as to whether it provided for all the 3 Parcels, the 1st respondent and Ng were entitled to the benefit of such an ambiguity in the interpretation of the first order. No proceedings for contempt can be founded on the alleged violation of an order, which is not clear and specific. (See: *Dulal Chandra Bhar v. Sukumar Banerjee* AIR [1958] Calcutta 474). In this regard it is important to bear in mind that the second order, which was recorded on 16 May 2001, did not preserve any part of the first order. The *ex parte* first order had therefore lapsed. As a consequence, there cannot be any contempt committed by the 1st respondent as alleged in the first, second and sixth charges in respect of the first order concerning all the 3 Parcels. For this reason, Ng could not also have been guilty. The Privy Council in *S.N. Bannerjee v. Kuchwar Lime & Stone Co. Ltd.* AIR [1938] PC 295 held that "where, as here, that party has not broken the injunction it is impossible to hold that anyone has aided or abetted them in breaking it".

[27] The second order also did not provide for the official receiver to receive and manage all the 3 Parcels for the reason that the order did not expressly state that the official receiver should receive and manage the parcels in question. Accordingly, there cannot be any contempt committed by the 1st respondent and Ng on the first, second and third charges in respect of the second order concerning the first, second and third parcels.

[28] As a result, based on all the aforesaid reasons the Committal Proceedings were misconceived. Hence, encl. 95 was dismissed with costs.